TESTIMONY OF THE HONORABLE EARL E. DEVANEY
INSPECTOR GENERAL FOR THE DEPARTMENT OF THE INTERIOR
BEFORE THE COMMITTEE ON GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES
MAY 5, 2004

Mr. Chairman and members of the Committee, I want to thank you for the opportunity to address the Committee this morning. At the outset, let me say that I have been pleased with the working relationship my office has developed with your staff, Mr. Chairman, and I appreciate the respect and professionalism that has been exhibited in our working relationship together.

I am here today to testify about my office's oversight activities concerning the tribal recognition process administered by the Department of the Interior. As you know, the Office of Inspector General has oversight responsibility for all programs and operations of the Department. However, because, the Inspector General Act specifically precludes the Office of Inspector General from exercising any programmatic responsibility, we cannot – and do not – substitute our judgment for substantive decisions or actions taken by the Department or its bureaus.

My office is simply not large enough to have subject-matter experts in all of the program areas in which we conduct our audits, investigations and evaluations. This is especially true in the area of tribal recognition, which typically involves historians, genealogists and cultural anthropologists. Therefore, when we undertake to address concerns – whether those concerns are raised on our own accord, or through another body such as Congress – about the operation or management of a DOI program, we first look at the established

processes by which decisions or actions in that particular program take place and the controls over those processes. After we determine what the established process is to address the issue at hand, we then look to see whether there has been any deviation from that process. If we determine that deviation occurred, we will go on to determine the impact of that deviation on the resulting decision or action and determine whether any inappropriate behavior was involved by either Department employees and/or external participants.

This is exactly how we have conducted investigations of matters relating to tribal recognition since I assumed the position of Inspector General in August 1999, including the most recent – concerning the recognition of the Schaghticoke tribe – which is still ongoing.

As you know, the tribal recognition, or acknowledgement process at the Department of the Interior is governed by regulations which set forth the process by which petitions seeking acknowledgement are handled. While this process has been harshly criticized for its lack of transparency, based on our experience, it is, relatively speaking, one of the more transparent processes in DOI, especially after several recent changes to the program. The process follows the requirements of the Administrative Procedures Act, which include, notice, an opportunity to comment, and an appeal or review mechanism. When we conduct any kind of inquiry, my office is always advantaged if a program has the backdrop of a well-established process with documented requirements and guidelines.

When conducting an investigation of a program such as tribal recognition, we also identify all the key participants and endeavor to strategically interview as many of these individuals as possible. This includes not only DOI personnel, but other interested parties outside of the Department as well. In tribal recognition matters, this may include other parties identified by the Office of Federal Acknowledgement or parties who have expressly signaled an interest in the acknowledgement process, such as an affected State Attorney General.

Accordingly, when we conduct interviews in a given tribal recognition process, we typically begin with those OFA team members who are charged with the petition review process. By beginning at this level, we have had some historical success at discovering irregularities at the very heart of the process. In our 2001 investigation of six petitions for acknowledgment – which included the Eastern Pequot Indians of Connecticut – we discovered that pressure had been exerted by political-decision makers on the OFA team members who were responsible for making the acknowledgment recommendations. The team members who reported this pressure were, at the time, courageous in their coming-forward, as my office had not yet established its now well-known Whistleblower Protection Program. At the time, we had to assure each individual who came forward that we would do everything necessary to protect them from reprisal; today, however, we have a recognized program in place which publicly assures DOI employees that we will ensure their protection. In other cases, we have had considerable success in obtaining candid information from lower-level employees intent on telling the Office of Inspector General their concerns. Therefore, given their track record in our 2001 investigation and

the now-established Whistleblower Protection Program, we feel confident that if any inappropriate pressure has been applied we will hear that from the members of the OFA team.

For instance, in 2001, we did find that there was some rather disturbing deviation from the established process during the previous Administration. At that time, several recognition decisions – including the Eastern Pequot petition – had been made by the acting Assistant Secretary for Indian Affairs, which were contrary to the recommendations of the acknowledgement review team. In several instances, the acknowledgement review team felt so strongly that they issued memoranda of non-concurrence, at some risk to their own careers.

Although any Assistant Secretary for Indian Affairs has the authority to issue his or her decision even if contrary to OFA's recommendation, we found in these particular instances that significant pressure had been placed on the review teams to issue a predetermined recommendation, that the decisions were hastened to occur prior to the change in Administration, that the decision makers used a consultant with questionable qualifications to support their decisions, and that all decision documents had not been properly signed. In fact, we even found that one of these decisions was signed by the former Acting Assistant Secretary after he had left office.

When we reported our findings in February 2002, the new Assistant Secretary for Indian Affairs undertook an independent review of the petitions. This action alleviated many of our concerns about the procedural irregularities we had identified in our report.

In July of 2002, five months after our report was published, the Assistant Secretary for Indian Affairs issued a Final Determination to Acknowledge the Eastern Pequot Indians of Connecticut as a portion of the historical Eastern Pequot Tribe. That Final Determination is presently before the Interior Board of Indian Appeals for reconsideration.

We were only recently asked to investigate the Schaghticoke tribal acknowledgement decision. Unfortunately, our investigation of the Schaghticoke decision is not yet complete; therefore, I cannot definitively comment on its outcome. I can, however, assure you that we are conducting a thorough investigation to determine whether there was any deviation from the established process in the consideration of the Schaghticoke petition and the decision rendered on the petition. We are, of course, interviewing OFA staff and acknowledgement review team members and senior Department officials to determine if undue pressure may have been exerted. In this case, we have spoken to the Connecticut Attorney General and members of his staff, as well as affected citizens, to ascertain their concerns. In this, as we have in all other such investigations, we are also looking for any inappropriate lobbying pressure that may have attempted to influence a decision one way or another. In the end, I am confident that we will be able to present a

thorough and complete report regarding the process by which this petition was ultimately acknowledged in January of 2004.

If I may digress for a moment, but only slightly, I would like to comment on outside influences that impact the tribal recognition and Indian gaming. In your invitation letter to me, you asked about any safeguards implemented since the adoption of the Indian Gaming Regulatory Act to prevent undue influence by undisclosed financial backers supporting tribal recognition petitions. To answer your inquiry directly, I know of no statutory or regulatory safeguards that preclude such financial backing of the tribal recognition process. That being said, however, given the recent media reports of alleged improper lobbying influences relating to Indian programs, my office now includes in its scope of investigation an inquiry into **any** lobbying influences that might bear on the issue or program at hand, with a view toward targeting improper lobbying access and/or influence on the Department of the Interior.

Recently, I sent Congressman Frank Wolf a list of issues which those of us who conduct investigations in Indian Country consider to be impediments to oversight and enforcement. One of those issues is the statute which permits recently departed DOI employees to represent recognized Indian tribes in connection with matters pending before the federal government. This exemption was created because Indian tribes, at the time, lacked effective representation in front of federal agencies. When the provision was enacted in 1975, virtually the only persons with expertise in Indian matters were federal employees. Today, that dynamic has changed. We believe that this statute has

outlived its original intent, and that this exemption now perpetuates a "revolving door" where federal employees who leave the government, after handling sensitive tribal issues in an official capacity, go on to represent the very same tribes on the same or similar issues before the government. Without the exemption to the normal "cooling off" period that all other departing Executive Branch employees must adhere to, this would be a violation of the criminal conflict of interest laws that apply to departing federal employees.

Another impediment to oversight and enforcement in the gaming arena is the use of consultant contracts by the tribes, instead of management contracts. Gaming tribes may enter into management contracts for operation of gaming activities if those contracts are submitted to and approved by the Chairman of the National Indian Gaming Commission (NIGC). Included in NICG's review is a background investigation of the principals and investors. Some tribes have circumvented the review and approval process by entering into "consultant" contracts which, although called by a different name, do not differ significantly from management contracts.

As a result, the terms of these consultant contracts, including financing and compensation, are not subject to review by NIGC, nor are the background of the consultants' principals and investors scrutinized. Ancillary agreements related to gaming operations (such as construction, transportation, and supplies) are also ripe for abuse.

This has resulted in the management and operation of some tribal gaming enterprises under financial arrangements unfavorable to those tribes. It has also opened the window for undesirable elements to operate and manage tribal casinos. During a recent FBI sponsored conference on investigations of crime in tribal gaming, the U.S. Attorney for the District of Minnesota said "many officials have stated that if they could only change one element of IGRA, it would be to ensure that management consultants are subject to the same requirements as management contractors."

The degree of transparency that lends itself to the tribal recognition process itself often fades when it comes to those who would use the recognition process as an instant opportunity for opening a casino. As a recent example, six days into trial in the prosecution stemming from one of our investigations, the U.S. Attorney's Office for the Northern District of New York secured a guilty plea, by an individual who had submitted fraudulent documents in an effort to obtain federal recognition for the Western Mohegan Tribe and Nation. Throughout trial, the prosecution contended that the fraudulent application was made in the hope of initiating gaming and casino operations in upstate New York. We are hopeful that this conviction will send a clear message to others who would attempt to corrupt the tribal acknowledgement process, particularly when motivated by gaming interests.

This murky underbelly is fraught with potential for abuse, including inappropriate lobbying activities and unsavory characters gaining an illicit foothold in Indian gaming operations. In response to this concern, we have increased our efforts and joined forces

with the FBI in order to leverage our mutual resources, sometimes in task force settings, where one of our agents is always paired up with one of theirs. Coupled with the strong commitment recently made by the twenty-six U.S. Attorneys who prosecute cases in Indian Country, I am confident that. you will begin to see the results of these efforts in the near future

Mr. Chairman, members of the Committee, this concludes my formal remarks today. I will be happy to answer any question you may have.